



IN THE
Supreme Court of the United States
October Term 1976

76-1436

SPRAGUE & RHODES COMMODITY CORP.,
AMERICAN SMELTING AND REFINING CO., *et al.*,

Petitioners,

v.

S.S. IRISH SPRUCE, her engines, tackle, etc., and IRISH SHIPPING
LTD., and COMPANIA PERUANA DE VAPORES, S.A.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**

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Statement of the Case

Petitioners have demonstrated no Constitutional issue, no question of admiralty jurisdiction or practice, no conflict between decisions of any of the United States Courts of Appeals—in fact, no reason whatever why this busy Court should give this matter its time and attention.

This is a routine case of the stranding of a vessel—the Irish flag *Irish Spruce*—and the consequent loss of her cargo. The vessel ran aground on Quito Sueno Bank in the Caribbean Sea in the early hours of January 27, 1972, while en route from South American ports to United States Gulf ports. The District Court, the Special Master to whom the matter was referred for trial, and the Court of Appeals are in full agreement that the immediate cause of the stranding was “errors in navigation”, for the conse-

quences of which an ocean carrier is expressly exonerated under the United States Carriage of Goods by Sea Act, 46 U.S. Code §§ 1300-1315 ("COGSA"). Petitioners do not quarrel with this conclusion.

Navigational errors having been established as the cause, the burden was Petitioners' to establish that some other cause *not* excepted under COGSA contributed to the stranding. *The Maru*, 459 F.2d 1370 (2d Cir. 1972) *cert. denied*, 409 U.S. 1115 (1973).

Shortly after the stranding, Petitioners were given the full run of the vessel, while she was still aground on Quito Sueno Bank, and within a few months the vessel's witnesses were subjected to vigorous cross-examination by Petitioners' Counsel, to whom all of the pertinent documents were made available. Nothing whatever could be found wrong with the *Irish Spruce*, or with her equipment, or with her manning. The only thing Petitioners thought they were entitled to criticize was the fact that the British Admiralty "List of Radio Signals" on board the *Irish Spruce* was a 1969 edition; a 1971 edition, publication of which had been announced in a "Notice to Mariners" some two and a half months before the stranding, at a time when the *Irish Spruce* was far from her home port of Dublin, had not reached the vessel, although it was waiting for her at New Orleans, her intended destination.*

The primary error in navigation was the failure of the Master and the watch officers to allow for the set of a current which was carrying the vessel off course during a period of limited visibility. Since they did not realize what

* At the hearing, Petitioners raised a question concerning the edition of the "Coast Pilot" (Sailing Directions) on board, but the Special Master concluded that this was not a contributing factor, and this conclusion was not disturbed by either the District Court or the Court of Appeals.

was happening, they continued steaming at full speed, navigating by dead reckoning and sun line positions, until the stranding.

Petitioners' statement that "In the instant case the navigators of the *Irish Spruce* used and relied on its radio direction finder and an out-dated List of Radio Signals because its up-to-date list was not aboard" (Petition, pp. 7-8) could hardly be more wrong. The undisputed evidence is that the navigators did *not* use and did *not* rely on the radio direction finder (RDF) or on the List of Radio Signals on board, which was *not* "out-dated" in any relevant respect.

At no time before the Second Officer took over the watch at midnight January 26-27th did it even occur to any of the watch officers to activate the RDF. Shortly after midnight the Second Officer switched it on, but as he was able to hear nothing but static he switched it off and thereafter gave it no further attention prior to the stranding, which occurred at 0329 hours January 27th.

There was, in fact, no evidence that the Second Officer had ever used an RDF for the purposes the Special Master hypothesized he would have used it for had the 1971 edition been on board. The Second Officer testified that the purpose for which he had, on other occasions, used an RDF (and for which he would continue to use it) was as a homing device when his vessel was heading for a point of land or the entrance to a port.

The Special Master thought that the watch officers should have used the RDF in an effort to take bearings on San Andres Island Aero Radiobeacon, that such bearings would have alerted them to the fact that their vessel was off course, and that steps could then have been taken to avoid a stranding.

There was absolutely nothing erroneous about the information contained in the 1969 edition. The Special Master's complaints were that it was not, in his view, as well indexed as the 1971 edition; that it did not, as did the 1971 edition, specifically state the power (one kilowatt*) of the San Andres Beacon, and that it did not, as did the 1971 edition, specifically state that the Beacon was in continuous operation, as indeed most aero radiobeacons are.**

It was for this reason, and this reason only, that the Special Master, in his first Report, concluded that the *Irish Spruce* was "unseaworthy", and that this "unseaworthiness" bore a causal relationship to the stranding.

Respondent having objected to the Report, the District Court accepted the Special Master's conclusion that the absence of the 1971 edition constituted "unseaworthiness", but did not at first agree there was a causal connection between it and the stranding. The case was therefore remanded to the Special Master for further findings on this issue.

The Special Master held his ground in a second Report, and Respondent again objected. This time the District Court confirmed both Reports, saying that the "synthesis of the evidentiary materials" in the second one had persuaded the Court that if the 1971 edition had been on board the Second Officer would have (1) examined it; (2) activated the RDF; (3) obtained a usable bearing on San Andres; (4) maintained a "running fix" and/or determined a "danger angle"; (5) been made aware that the dead

* A one kilowatt aero radiobeacon is not particularly powerful; it is, in fact, a bit below the average.

** The 1969 edition contained a very legible chart, in color, showing the location of the Beacon, its frequency, and its call sign. No chart showing the call sign or frequency appears in the 1971 edition.

reckoning was wrong, and (6) persuaded the Master to take steps that would have prevented the stranding.

The Court of Appeals unanimously reversed. In an opinion by Judge Lumbard, the Court concluded that there was no causal relationship between the absence of the 1971 edition and the stranding, saying:

"* * * Here the damage was not a consequence of any inadequacy in the 1969 edition; the damage resulted from the ship's officers' failure to make full use of the 1969 edition. It is no reflection on the 1969 edition that the accident might have been avoided because Officer Healy would have studied the 1971 edition and found in it what he had overlooked in the 1969 edition. Therefore, any unseaworthiness which conceivably might be charged to the absence of the 1971 edition cannot be held to have been a proximate cause of the stranding."

The question of whether or not a given set of facts constitutes "unseaworthiness" is a question of law, and is therefore not subject to the "clearly erroneous" rule. It is implicit in Judge Lumbard's opinion that in the view of the Court of Appeals the absence of the 1971 edition did not constitute "unseaworthiness". In any case, it is clear that even if its absence could have been considered "unseaworthiness", the Court would still have exonerated Respondent, since it concluded that there was no causal connection between the absence and the casualty.

Petitioners petitioned for rehearing and for rehearing *en banc*. Both petitions were unanimously denied, which of course meant that not only no member of the Panel that decided the case, but no active judge of the Second Circuit thought the decision deserved another look.

The Alleged Conflict among the Circuits

Petitioners seem to contend that a mere determination of "unseaworthiness" negates the error in navigation exception of COGSA, even without a finding of causation. If this is what Petitioners are contending, they are manifestly wrong.

Since navigational error was established as the immediate cause of the loss, Respondent was entitled to exoneration because Petitioners were unable to meet the burden then imposed upon them of proving (1) that the *Irish Spruce* was "unseaworthy", and (2) that the "unseaworthiness" was a cause of the loss. *Director General of India Supply Mission v. S.S. Maru*, supra; *Wilbur Ellis Co. v. M/V Captayannis*, 306 F.Supp. 866 (D.Ore. 1969), aff'd 451 F.2d 973 (9th Cir. 1971), cert. denied 405 U.S. 923 (1972); *California & Hawaii Sugar Co. v. Columbia S.S. Co., Inc.*, 510 F.2d 542 (5th Cir. 1975). The cases cited by Petitioners from Circuits other than the Second do no more than recognize and apply this order of proof established under COGSA.

In *Waterman Steamship Corporation v. Gay Cottons (The Chickasaw)*, 414 F.2d 724 (9th Cir. 1969), the vessel's RDF was defective, and this was held a statutory fault. The Court of Appeals for the Ninth Circuit applied the "Pennsylvania rule",* and imposed upon the carrier the burden of proving that the defective RDF could not have been a cause of the casualty. Since the crew had actually used the RDF and had obtained "wildly divergent and inconsistent fixes" (414 F.2d at 737), the carrier could not sustain the burden.

* The Pennsylvania, 86 U.S. 125, 136 (1873).

The *Irish Spruce's* RDF was in no way defective, and it was not used at the material times. *The Chickasaw* is therefore plainly inapposite.

In *The Maria (Gladioli v. Standard Export Lumber Co., Inc.)*, 91 F.2d 819 (4th Cir. 1937), the vessel "was in fact navigated in reliance upon the faulty charts and navigational data which the Master produced when his deposition was taken, and . . . as a result, the stranding took place". 91 F.2d, at 831.

The *Irish Spruce* was not navigated in reliance upon any faulty information, and the decision in *The Maria* is wholly in accord with that of the Court of Appeals in the instant case.

Nor is there any discernible conflict between the Second Circuit's decision herein and *Ionian Steamship Co. v. United Distillers of America, Inc.*, 236 F.2d 78 (5th Cir. 1956), wherein the *Ionian Pioneer* was found to be a totally unseaworthy ship, and the unseaworthiness was found to be causative of the stranding. See the opening paragraph of the District Court's opinion, *United Distillers of America, Inc. v. T/S Ionian Pioneer*, 130 F.Supp. 647, 648 (E.D. La. 1955), where the court said, in describing the *Ionian Pioneer*:

" . . . She was rusty, she was leaky, she was hogged. More importantly, and most unfortunately, she had an unpredictable penchant for sheering to port at the most inopportune moments. On two such sheers, she went aground and libellant here has sued for the value of the cargo lost by jettison as a result of these strandings. A short time after the incidents in suit, the vessel lost its classification and was considerably consigned to scrap."

The reason for Petitioners' inclusion of a quotation from the District Court's opinion in *Union Carbide & Carbon Corp. v. The Walter Raleigh*, 109 F.Supp. 781 (S.D.N.Y. 1951), *aff'd* 200 F.2d 908 (2d Cir. 1953), in the section of their Petition purporting to find conflicts between the decision in the instant case and those in other circuits is not apparent, since the cited case was a decision of the District Court for the Southern District of New York and the affirmance, was, of course, by the Second Circuit Court of Appeals, whose unanimous opinion herein Petitioners are asking this Court to review. In any event, the rule of law expressed in the language quoted by Petitioners was in no way questioned by the Court of Appeals in this case.

Petitioners' Criticism of the *Irish Spruce*

Petitioners call the Court's attention to the case of the *Argo Merchant*, which grounded off the United States East Coast last December. That case is now in litigation, and Respondent therefore considers it inappropriate to comment on Petitioners' suggestion that the *Argo Merchant* was not maintained in a seaworthy condition. But that vessel's condition is not in issue here, and to suggest that the *Irish Spruce* was not maintained in a seaworthy condition is to ask the Court to reach a conclusion supported by no evidence whatever and in fact contradicted by the record.

Petitioners offer no support for their sweeping statements (Petition, P. 13) that "Most foreign vessels are not subject to the same inspection standards that the U. S. Coast Guard imposes on U. S. Vessels," and that "Because of cost cutting and haphazard management many ships are not maintained in a seaworthy condition . . .". In any event there is no evidence that Irish (and British) vessels are not subject to the same (or higher) standards than American vessels, or that the Irish Government company

which owned the *Irish Spruce* was guilty of any "cost cutting" or "haphazard management" in maintaining the seaworthiness of its fleet, including the *Irish Spruce*.

The arguments for and against "flags of convenience" are not in issue here, but in any case the Irish flag is *not* a "flag of convenience". Irish Shipping Ltd. is a company wholly owned by the Irish Government. The standards of seaworthiness imposed by that Government are patterned after those of the British, and Irish officers' licenses are interchangeable with British licenses.

The *Irish Spruce* was built in England and classed "100A-1" with Lloyd's Register of Shipping, the British counterpart of the American Bureau of Shipping. She was equipped with an unusual number of sophisticated electronic and other navigational devices for a vessel of her size and age, including, besides RDF, gyro compass, radar, "automatic pilot", course recorder, fathometer (depth sounder) and "Decca Navigator" (a British type electronic position finding device).

The vessel's Master had held a British Master's license since 1945. Each of the deck officers held a *higher* license than his position required. The Special Master himself attested to the competency of the Second Officer in particular, using that officer's conscientiousness as the basis for his wholly speculative finding that he would have examined and used the 1971 edition of the List of Radio Signals had it been on board.

The *Irish Spruce* was thoroughly seaworthy and properly manned, equipped and supplied. But even Homer may nod, and on this occasion her fully competent deck officers nodded. It was their errors in navigation alone, and not the perfectly accurate edition of the Admiralty List of Radio Signals on board the *Irish Spruce* that brought about her destruction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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